

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 17, 2006 Session

THOMAS DOUGLAS ANDERSON v. DIMPLE MAE MURR ANDERSON

**Direct Appeal from the Circuit Court for Monroe County
No. V03126H Hon. John B. Hagler, Circuit Judge**

No. E2005-02110-COA-R3-CV - FILED SEPTEMBER 5, 2006

The Trial Court granted the parties a divorce, denied wife alimony, and divided the marital property. The wife takes issue with the Judge's valuations and his refusal to award alimony. We affirm, but modify the property settlement.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed, as Modified.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Peter Alliman, Madisonville, Tennessee, for appellant.

Marilyn L. Hudson, Knoxville, Tennessee, for appellee.

OPINION

The determinative issue in this divorce action is whether the Trial Judge placed a proper value on the husband's stock in a closely held corporation.

A hearing was held on December 7, 2004, regarding the value of the husband's interest in Monroe County Mobile Homes, Inc. Douglas Warren, a Certified Public Accountant, had

been employed by both parties to establish the value of the husband's stock in that company.

Warren testified that he was the CPA for the corporation, and had been the company's CPA since the early to mid 1970s. He testified the company had been valued on two prior occasions, once at the death of a shareholder and again when another shareholder wanted to make a gift to his son. He testified that he also reviewed the current five-year financial history of the company, by looking at the tax returns and annual financial statements, and used this information to analyze the value in accordance with Revenue Ruling 59-60, which states that one should look at market value, asset value, and income value.

Warren testified that the husband owned 43.75% of the stock in the company, and that to get the value of his interest, he took the "fair value" of the entire company, which was \$1,518,000.00, and calculated 43.75% of that value. He then testified that the fair value was based on one buyer purchasing the entire corporation, whereas fair market value would only consider selling the minority interest. He took into account the nature of the business and its history, and also considered the economic status of the industry and the nation at the date of the valuation. He testified that the company was declining in value, because the mobile home industry had declined in recent years due to a drop in the economy, and also a lack of financing options.

Warren testified that the asset value had gone down by about \$500,000.00 in the last four years, and that low sales had caused a decline of 16-18%. He said the sales had been low because interest rates had been low, which allowed people who would buy mobile homes to buy regular homes. He conceded that if interest rates increased, sales could also increase.

Warren testified that he considered and rejected using the book value method to value the company, because the book value of \$3.6 million was only based on accounting principles, and did not consider fair market value, and that he considered and rejected several methods of valuation that he did not think would fairly represent the value of the company.

Warren testified that he came up with an initial value of \$2.7 million, by averaging the value reached by using the three methods. He then discounted the value by 38.3%, because the husband owned a minority interest, and thus could not actually control the company and salaries, dividends, cash flow, etc. He thus reduced the value to \$1.6 million, and testified that the 38.3 figure came from comparing actual sales versus fair value.

Warren also testified that he reduced that value by 10% for a marketability discount, which he said was what it would cost to market the husband's interest for sale, in terms of advertising, broker fees, etc. He concluded that the fair market value of the husband's interest would be \$665,000.00, based on these discounts. On cross-examination, he admitted that if the entire company sold, the husband's value would be approximately \$1.2 million.

As to the evaluation, the Court ruled from the bench, stating that Warren properly applied the standards set forth in Revenue Ruling 59-60, which was approved in the case of *Wallace*

v. Wallace, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987), and he adopted the expert's value of the husband's minority interest at \$664,300.00.

Another hearing was held where the parties testified and ultimately the Court entered an Order divorcing the parties and awarded each the Laurel Lake Circle property, and awarded each \$95,000 of its value, stating the husband could either choose to sell it and divide the proceeds, or buy out the wife's interest. The Court valued the Disney timeshares at \$50,000.00, which the Court stated was within the range of values presented by the parties, and found the value of the furnishings to be \$12,500.00, and the value of the guns to be \$10,000.00. The Court awarded the wife assets of \$738,101.00, and awarded the husband assets of \$1,982,761.00. After awarding the debts of the marriage to the parties, the Court found that the wife would receive \$687,908.00 as a net distribution, and the husband would receive \$967,577.00,¹ which essentially represented 42% to the wife and 58% to the husband. The Court stated that he had taken into account the earning capacities, duration of the marriage, and the ability of each party to acquire additional assets, and declined to award alimony on the grounds that no need had been shown, as the wife was working and earning income, and was taking most of her assets awarded free of debt.

The wife has appealed and presents these issues:

1. Whether the trial court erred in the valuation of husband's interest in Monroe County Mobile Homes, Inc.?
2. Whether the trial court erred in its distribution of property?
3. Whether the trial court erred in failing to award wife alimony?
4. Whether the trial court erred in failing to award wife all of her attorney's fees?

The wife argues that the Trial Court undervalued the husband's interest in the mobile home business, asserting that the expert's valuation was improperly based on fair market value.

As this Court stated in *Wallace*.

The value of marital property is a fact question. Thus, a trial court's decision with regard to the value of a marital asset will be given great weight on appeal. In accordance with Tenn.R.App.P. 13(d), the trial court's decisions with regard to the valuation and distribution of marital property will be presumed to be correct unless the evidence preponderates otherwise.

The value of a marital asset is determined by considering all relevant evidence

¹The husband was awarded the shares in Monroe County Mobile Homes, Inc.

regarding value. The burden is on the parties to produce competent evidence of value, and the parties are bound by the evidence they present. Thus the trial court, in its discretion, is free to place a value on a marital asset that is within the range of the evidence submitted.

There are a number of acceptable methods available to determine the value of a corporation. *Blasingame v. American Materials Inc.*, 654 S.W.2d 659, 666 (Tenn.1983) recognized three of these methods: (1) the market value method, (2) the asset value method, and (3) the earnings value or capitalization of earnings method. There are still others including the dividend method and the liquidating value method. The choice of the proper method or combination of methods depends upon the unique circumstances of each corporation.

A public corporation's value is most reliably determined using the market value method. This method presumes that there is an established market for the corporation's stock which will enable the court to arrive at the price a willing buyer would pay for the stock. The stock in closely held corporations is rarely traded. Thus, it is improper to attempt to place a value of a closely held corporation using the method generally used to place a value on a public corporation

(Citations omitted).

The husband argues, in response to the wife's claim, that the value adopted by the Court was within the range of evidence submitted, and the evaluation should be affirmed.

The only evidence before the Court on the evaluation was presented by the parties' joint expert, and reviewing his testimony and report, it appears that he averaged the values obtained from using three different valuation methods which he felt were most applicable to this type of company to arrive at his conclusion as to value. Warren then made a downward adjustment in the value due to the fact that the husband owned a minority interest, and also discounted for costs associated with a sale of the company, which he described as "marketability discounts".

As stated in *Wallace*, fair market value is typically only one of the methods employed in calculating value, and is more typically used in the valuation of a public corporation, where there is an established market for the stock. *Wallace*, at 107. As further explained in that case, fair market value is typically not a reasonable method for valuing a closely held corporation, because the stock is rarely traded and there is no "market". *Id.* This Court went on to state:

Determining the value of a closely held corporation is not an exact science. The courts have not articulated a consistent approach to the valuation of this type of marital asset. However, Rev.Rul. 59-60, 1959-1 C.B. 237 has been recognized as providing the most comprehensive guide to making this determination. But Rev.Rul. 59-60 is intended to be only a guide. It was never intended to be an inflexible rule.

Rev.Rul. 59-60 contains nine factors which should be considered when determining a closely held corporation's value. These factors are:

- (1) the nature of the business, including its history since organization,
- (2) the economic status of the industry and the nation at the critical date of valuation,
- (3) book value,
- (4) earnings,
- (5) dividends and dividend paying capacity,
- (6) the existence or lack of good will or other intangible value,
- (7) sales of the stock and the size of the block to be valued,
- (8) the selling price of comparable securities relative to their earnings, dividends and asset values,
- (9) the life insurance proceeds received by a corporate beneficiary on a policy covering the sole or controlling stockholder.

Id.

Warren's initial valuation method took these factors into account, as he testified, he then went on to discount his valuation, as noted. The reasons given by Warren to discount the value of the husband's minority interest are persuasive, and the evidence does not preponderate against discounting the value by 38.3%. However, he reduced the value by an additional 10% for a "marketability discount". We conclude this further discount was inappropriate because no sale was ordered and there is no indication in the record that the husband has any intention of selling his minority stock. The 10% reduction was in the amount of \$168,714.00, and when this discount is removed, the value of the husband's minority stock interest is \$742,343.00. The Trial Court's finding of value is increased to that amount, an increase of \$78,043.00..

Next, the wife argues that it was improper for the Court to distribute the marital property 58% to husband and 42% to her, and that the Court was required to take into account all relevant factors set forth in Tenn. Code Ann. § 36-4-121(c) in making an equitable distribution of marital property:²

²Tenn. Code Ann. § 36-4-121(c) provides:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation,

As we have previously said, “A trial court is allowed wide latitude in determining an equitable division of marital property and we will defer to the trial court's determination unless it is inconsistent with the factors set forth in Tenn. Code Ann. § 36-4-121(c), or there is a preponderance of evidence to the contrary. *Conley v. Conley*, 181 S.W.3d 692, 700 (Tenn. Ct. App. 2005). We have also made clear that, “[t]he division of the estate is not rendered inequitable simply because it is not mathematically equal”. *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App.1998). Taking into account all the statutory factors and the evidence, we cannot say the evidence preponderates against the findings of the Trial Court. However, due to our determination of the value of the husband's stock, the marital estate is increased in value by \$78,043.00. It is therefore appropriate for the wife to receive 42% of that amount or \$33,377.00, and the Trial Court's Decree will be modified to that extent, i.e., the husband will pay the wife an additional \$33,377.00 to complete the division of marital assets.

The wife also argues that she should have received an alimony award, and emphasizes her declining health and husband's greater earning capacity. As the Trial Court found, however, the wife was granted significant assets with little or no accompanying debt. Even though the husband's salary was greater, the wife still earned a salary of approximately \$50,000.00, and many of her expenses were shown to be inflated. The evidence does not preponderate against the Trial Court's finding that there was no need for alimony. Tenn. R. App. P. 13(d). Moreover, since the property distribution is adjusted to reflect the increased value of the interest in the mobile home business, the wife is given a greater amount in her distribution of marital assets.

Similarly, with respect to the attorney's fee award,³ the Court found that this was an extension of alimony, and additional fees were unwarranted in this case because the wife would have significant assets from which to pay her fees. We find this issue also to be without merit.

depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;

(6) The value of the separate property of each party;

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective.

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits available to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties.

³The wife claimed the Court should have awarded her all the attorney's fees she was obligated to pay.

We affirm the Trial Court's Judgment, as modified in increasing the value of the husband's minority interest in Monroe County Mobile Home, Inc., and remand, with the cost of the appeal assessed one-half to each party.

HERSCHEL PICKENS FRANKS, P.J.